Supreme Court, U.S.
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No. 85-335

In the Supreme Court of the United States

OCTOBER TERM, 1985

VINCENT DI NAPOLI, PETITIONER

v.

NORTHEAST REGIONAL PAROLE COMMISSION, ET AL.

ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE SECOND CIRCUIT

SUPPLEMENTAL MEMORANDUM FOR THE RESPONDENTS

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Pursuant to Rule 22.6 of the Rules of this Court, we respectfully file this supplemental memorandum to bring to the Court's attention the recent decision of the United States Court of Appeals for the Third Circuit in *United States ex rel. Forman* v. *McCall (Forman II),* No. 84-5755 (Nov. 14, 1985).

Petitioner relies (Pet. 14-15) on the district court's decision in *Forman* in urging the Court to grant certiorari here. The district court in *Forman* found, after a prior remand by the Third Circuit (709 F.2d 852 (1983) (*Forman I*)), that the Parole Commission's parole guidelines were not flexibly applied, and it therefore held that they constitute "Laws" for purposes of the Ex Post Facto Clause. The court of appeals in *Forman II* has now reversed that holding. The court of appeals explained that it had "carefully reviewed the record developed on remand and conclude[d] that it

unequivocally demonstrates that the guidelines are applied with substantial flexibility." Slip op. 3; see generally *id.* at 10-17. Accordingly, the court of appeals rejected the prisoner's claim of an ex post facto violation. This holding by the Third Circuit removes any basis for petitioner's apparent assertion (Pet. 14-15) that there is a conflict among the courts of appeals on the question whether the Commission's application of more disadvantageous guidelines in effect at the time of the prisoner's parole hearing, rather than those in effect when he committed the offense, violates the Ex Post Facto Clause.

The panel in *Forman II* recognized that its underlying legal premise—that parole guidelines can be considered "Laws" for purposes of ex post facto analysis if they are administered without sufficient flexibility—has been rejected by every other court of appeals that has considered the question, including the Second Circuit in the instant case. See slip op. 5-6 & nn. 3, 4.* But the panel concluded that it was bound by the prior circuit precedent on that question in *Forman I* and *Geraghty* v. *United States Parole Commission,* 579 F.2d 238 (3d Cir. 1978), vacated and remanded on other grounds, 445 U.S. 388 (1980). Slip op. 6. In light of the court of appeals' conclusion that the guidelines are flexibly administered, any divergence of views on that legal issue is of no importance here. Moreover, Judge Higginbotham concurred in the judgment on the ground that the parole guidelines should not be considered "Laws" for purposes of ex post facto analysis, irrespective of the flexibility with which they are administered, and he urged the full court to reconsider that issue en banc. Slip op. 19-20, 30-31. If the full Third Circuit were to pursue Judge Higginbotham's suggestion and overrule *Geraghty* and

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* We have listed the various court of appeals decisions in our brief in opposition (at 5-6) in this case.

Forman I, not only would there be no conflict in the holdings of the various courts of appeals on the ex post facto issue involved in this case; there also would be no disagreement regarding the appropriate analysis of that issue. These recent developments in *Forman II* confirm that the ex post facto issue presented in the instant case does not warrant review by this Court.

For the foregoing reasons and the additional reasons stated in the brief in opposition, it is respectfully submitted that the petition for a writ of certiorari should be denied.

CHARLES FRIED
Solicitor General

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